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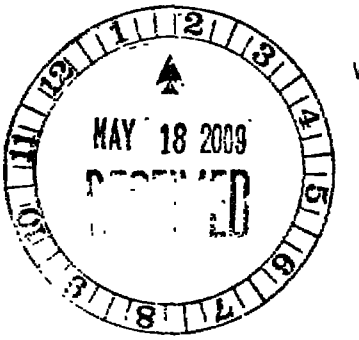

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May 18, 2009

BY HAND DELIVERY

Anne K. Quinlan
Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: Docket No. AB 167 (Sub-No. 1189X)
Consolidated Rail Corporation—Abandonment
Exemption—in Hudson County, New Jersey 225118

Docket No. AB 55 (Sub-No. 686X)
CSX Transportation, Inc.—Discontinuance
Exemption—in Hudson County, New Jersey 225119

Docket No. AB 290 (Sub-No. 306X)
Norfolk Southern Railway Company—
Discontinuance Exemption—in Hudson
County, New Jersey 225121

Dear Secretary Quinlan:

Enclosed for filing with the Board are the original and ten copies of Reply of Consolidated Rail Corporation to "Motion to Reopen." Please date-stamp the enclosed extra copy and return it to our representative.

Sincerely yours,

Robert M. Jenkins III

RMJ/bs

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB NO. AB 167 (SUB-NO. 1189X)

CONSOLIDATED RAIL CORPORATION – ABANDONMENT EXEMPTION – IN HUDSON COUNTY, NEW JERSEY

STB NO. AB 55 (SUB-NO. 686X)

CSX TRANSPORTATION, INC. – DISCONTINUANCE EXEMPTION – IN HUDSON COUNTY, NEW JERSEY

STB NO AB 290 (SUB-NO. 306X)

NORFOLK SOUTHERN RAILWAY COMPANY – DISCONTINUANCE EXEMPTION – IN HUDSON COUNTY, NEW JERSEY

NOTICES OF EXEMPTION

REPLY OF CONSOLIDATED RAIL CORPORATION TO "MOTION TO REOPEN"

Consolidated Rail Corporation ("Conrail") replies here to the "Motion to Reopen" that the City of Jersey City, Embankment Preservation Coalition, and Rails to Trails Conservancy (collectively, the "City") filed on May 7, 2009.

The Motion to Reopen is the latest in a slew of highly repetitive pleadings that the City has filed in these proceedings. Conrail has replied to virtually all of the arguments the City has made in those pleadings—typically, more than once—and we will not burden the record further by repeating our reply arguments here. *See* Comments of Consolidated Rail Corporation on Issues Raised by Pre-Filing Correspondence, filed January 6, 2009; Conrail's Reply to City Parties' "Restatement of Previously Requested Relief and Reservation of Rights," filed March

18, 2009; Conrail's Reply to Notices of Intent to File an Offer of Financial Assistance, filed April 1, 2009; Conrail's Reply to Embankment Preservation Coalition's Letter to Secretary Quinlan, filed April 1, 2009; Conrail's Reply in Opposition to the City of Jersey City's "Motion to Toll Time Period for Submitting OFA and Motion for 7-Day Extension of Time to Reply to Conrail Motion to Reject," filed April 9, 2009; Conrail's Reply to City's Motion for Reconsideration, filed April 28, 2009; Conrail's Motion to Strike or, in the Alternative, for Acceptance of Reply to Reply, filed May 5, 2009; and Comments of Consolidated Rail Corporation on Environmental Assessment, filed May 7, 2009.

The only new argument that the City makes in its motion is that "Conrail may not be the appropriate party to seek abandonment authority for all or portions of this line." Motion to Reopen at 1 n.1. The City cross-references its "Additional Environmental Comments," also filed on May 7, 2009, for its discussion of this argument. None of the other arguments made in the City's Additional Environmental Comments is new.

Neither the City's new argument nor any of the other arguments that the City references in its motion comes close to meeting the Board's standards for reopening an abandonment exemption. Under 49 C.F.R. § 1152.25(c)(2)(ii), the Board will grant a petition to reopen only "upon a showing that the action would be affected materially because of new evidence, changed circumstances, or material error." The City does not reference these standards or make any attempt to demonstrate "in detail" the respects in which those strict standards for reopening are met. 49 C.F.R. § 1152.25(e)(4). There is not even a hint of an allegation of new evidence or substantially changed circumstances. It is possible the City's position is that the claims it makes in its Additional Environmental Comments and other referenced pleadings all involve "material error." But, as Conrail has already shown in its replies to the City's previous submissions, the

City has failed to establish that the Board has committed error at all, much less "material" error, with regard to any of the points the City has repeatedly raised and Conrail has repeatedly been obliged to address. The City's newly-minted argument fares no better.

That new argument—that Conrail may not be the right party to file for abandonment—is not only wrong as a matter of law, but is contradicted by the City's own strongly advocated position from the outset of the Board's proceedings regarding the Harsimus Branch. In its original Petition for Declaratory Order, filed January 12, 2006, in Docket No. 34818, the City asked the Board "to resolve a controversy created by the attempt by Consolidated Rail Corporation ('Conrail') to abandon rail services and sell a portion of track in Jersey City, NJ, without prior authorization by this Board." Pet. for Dec. Order at 1. The City asked the Board "to require Conrail to initiate an abandonment proceeding." Id. at 29. The Board, characterizing the issue as "whether Consolidated Rail Corporation (Conrail) needs prior agency authorization to abandon the Harsimus Branch and Six Street Embankment," granted the City's request to initiate a declaratory order proceeding. *City of Jersey City, et al.—Pet. for Dec. Order*, STB Fin. Dkt. No. 34818 (served Feb. 8, 2006), slip op. at 1. In its August 2007 decision on the merits, the Board repeated that the issue the City had posed was whether Conrail "needs prior agency authorization" to abandon the Sixth Street Embankment, and the Board held that prior authorization was required. Decision served August 9, 2007 ("August 2007 Decision"), slip op. at 1.

When Conrail in early 2008 originally began the process of notifying the appropriate agencies and governmental entities that it would be filing for abandonment, the City raised a variety of concerns about the process, but nowhere suggested that Conrail was not the right party to file for abandonment. When Conrail filed notices of exemption on January 6, 2009, the City

again raised a number of objections to those notices, but none of those objections was that Conrail was not the right party to file for abandonment. And when Conrail refiled notices of exemption on February 26, 2009, the City made a number of objections, but made no argument that Conrail was not the right party to file for abandonment.

In short, it was not until the City filed its Additional Environmental Comments—over *three years* after it first insisted that Conrail should be required to file for abandonment, during which time the City has filed *dozens* of pleadings at the Board concerning abandonment of the Harsimus Branch—that the City first suggested that Conrail was not the right party to file for abandonment. The City's belated attempt to reverse course should be seen for what it is: a transparent ploy to delay yet again the very proceeding it insisted was required. The Board should not permit its processes to be so abused.

In any event, the City's thirteenth-hour argument is wrong as a matter of law. The City's new-found suggestion that Conrail may not be the proper party to be seeking abandonment authority in this proceeding relies on *Illinois Central Railroad Company—Abandonment Exemption—in St. Tammany Parish, LA*, Docket No. AB-43 (Sub-No. 154X), 1991 WL 238669 (served Nov. 8, 1991) and 1992 WL 161017 (served July 2, 1992), and its progeny—in particular, *Orange County Transp. Auth.—Acquisition Exemption—The Atchison, Topeka and Santa Fe Railway Co.*, Fin. Docket No. 32173, 10 I.C.C.2d 78, 1994 WL 114003 (served Apr. 7, 1994), and *Missouri River Bridge Co.—Acquisition Exemption - Certain Assets of Chicago, Central & Pacific Railroad Co.*, Fin. Docket No. 32384, 1994 WL 61756 (served March 3, 1994). *See* Additional Environmental Comments at 5-10.

None of these cases remotely supports the City's argument that SLH Properties, rather than Conrail, may be the proper party to seek abandonment authority in this proceeding. Each of

those cases involved rail lines that (i) were indisputably subject to the ICC's jurisdiction; (ii) had rail infrastructure and operations that required ongoing maintenance, scheduling, and dispatching; and (iii) had active shippers. Thus, where the common carrier obligation resided and whether the selling railroad retained sufficient authority over such issues as maintenance and dispatching to enable it to fulfill common carrier obligations were live issues in those cases—issues, incidentally, that each of the cases cited by the City decided in favor of the carrier.

In this case, by contrast, the Harsimus Branch (i) was not conceived to be subject to the Board's jurisdiction when the sales were made; (ii) no longer has basic rail infrastructure and has not been used for freight operations for decades; and (iii) has no active shippers and has not had any for decades. Thus, for the Harsimus Branch, it would elevate form over both substance and common sense to even query whether the current non-railroad property owners (rather than Conrail) have common carrier obligations or—what amounts to the same thing—such control over functions like dispatching, scheduling, and maintenance that Conrail could not be deemed to be able to carry out its common carrier obligations on the line. Such functions are not performed on this line, have not been performed for nearly two decades, and have no reasonable prospects of ever being required again.

It bears emphasizing that the properties underlying the Harsimus Branch were sold not just to SLH, but to a number of other entities east of Marin Boulevard. Those properties have been extensively developed for condominiums, office buildings, hotels, and retail establishments. The City's reasoning (if accepted) would compel the conclusion that *all* of these entities—not just SLH—may have assumed common carrier obligations and thus must file for abandonment. We suspect that even the City—if it was candid—would find this result repellant

The net effect of the Board's August 2007 Decision, as requested by the City, is that Conrail retains a common carrier obligation over the old Harsimus Branch right-of-way. For all intents and purposes, Conrail has a constructive easement that cannot be extinguished without abandonment authority from the Board. Abandonment authority is what Conrail is seeking, as the City demanded, in this proceeding. Contrary to the City's suggestion that Conrail's "illegal sales" have deprived the City of historic preservation or environmental remedies that the City would have had if Conrail still owned the right-of-way (Additional Environmental Comments at 6), the City is in no different position than if Conrail still owned the right-of-way. With respect to historic preservation remedies, Conrail is fully prepared to offer and provide the same historic preservation mitigation remedies for the Embankment properties and for the Harsimus Branch as a whole that it would provide if it still owned the underlying fee interest in the property. *Housatonic R.R. Co., Inc.—Operation Exemption*, Fin. Docket No. 31780 (Sub-No. 2), 1994 WL 156224, *5 (April 29, 1994); *Implementation of Environmental Laws*, 7 I.C.C.2d 807, 828-829, 1991 WL 152985, *13-14 (1991).[1]

[1] In its Motion to Reopen, the City references a letter filed with the Board on May 7, 2009, by the New Jersey Deputy State Historic Preservation Officer ("SHPO"). In that letter the SHPO complains that but for Conrail's sales to the various parties that have bought former Harsimus Branch properties for development purposes, it might have negotiated an "historic preservation easement" for the Harsimus Branch. SHPO Letter to Secretary Quinlan, at 2. The SHPO is mistaken. Conrail would not, and will not, agree to such an easement in a Section 106 proceeding, because it could substantially adversely affect the market value of the properties. The ICC made clear by rule that the most the agency can require of railroads in a Section 106 proceeding is that they provide documentation of rail lines, bridges, and other historic structures to preserve the historic record, *see Implementation of Environmental Laws*, 7 I.C.C.2d 807, 828-829, 1991 WL 152985, *13-14 (1991), and the ICC and the STB have adhered to that rule since, *see Housatonic R.R. Co., Inc.—Operation Exemption*, Fin. Docket No. 31780 (Sub-No. 2), 1994 WL 156224, *5 (April 29, 1994); *Union Pacific R.R. Co.—Abandonment and Discontinuance of Trackage Rights Exemption—In Los Angeles County, CA*, Docket No. AB-33 (Sub No. 265X), 2008 WL 1968727 (served May 7, 2008).

With respect to environmental issues, the City and other parties with environmental concerns are also in no different position than they would be if Conrail still owned the right of way. As SEA correctly observed in the EA, "case law and Board precedent clearly establish that the Board's NEPA review of a proposed abandonment properly is focused on the potential environmental impacts resulting from diversion of traffic from rail to other modes and salvage of the rail line." EA at 7 (citing *Iowa Southern R.R. Co.—Exemption—Abandonment*, 5 I.C.C.2d 496 (1989), aff'd sub nom. *Goos v. ICC*, 911 F.2d 1283 (8th Cir. 1990)). As discussed in the EA, there is no traffic to divert from rail to other modes, and there would not be any such traffic regardless of whether Conrail still owned the right-of-way. There is also no rail infrastructure to salvage, and there would not be regardless of whether Conrail still owned the right-of-way. Further, regardless of whether Conrail still owned the right-of-way, the Board would reject claims that it had either authority or justification to evaluate the environmental effects of possible reuse by third parties. EA at 4, 8.[2]

Accordingly, the cases cited by the City simply do not support the argument that Conrail is not the proper party to have submitted the notices of exemption in this case. The City's argument on this score is simply yet another in a series of its baseless attempts to obstruct and delay these proceedings.

Respectfully submitted,

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[2] For a fuller discussion of this point, see Conrail's Comments on Environmental Assessment, filed May 7, 2009, at 11-14.

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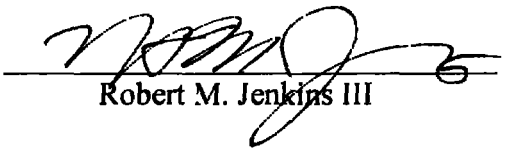
Dated: May __, 2009

CERTIFICATE OF SERVICE

I hereby certify that on May18. 2009. I caused a copy of Reply of Consolidated Rail Corporation to "Motion to Reopen" to be served by first class mail (except where otherwise indicated) on those appearing on the attached Service List.



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